Natural Resource
Restoration & Conservation

November 8, 2010

EPA Docket Center Public Reading Room
EPA Headquarters West, Room 3340
1301 Constitution Avenue, NW
Washington, D.C. 20460

Please accept this letter from Restoration Systems (RS) as part of the public comment period for the draft Chesapeake Bay Total Maximum Daily Load (TMDL) issued by the Environmental Protection Agency September 24, 2010.

RS applauds the long and difficult work by EPA to develop this TMDL, the largest ever developed, in order to restore the Chesapeake Bay and its multitude of streams, creeks, rivers, and wetlands.

BACKGROUND

Since 1998 RS has been in the business of providing compensatory wetland, stream, and riparian buffer mitigation; through mitigation banks, as a third party provider of Permittee Responsible Mitigation, or as a Full Delivery (all the same tasks of a bank) provider to the state run In-Lieu Fee program, the North Carolina Ecosystem Enhancement Program (NCEEP).

RS has been an active member of the National Mitigation Banking Association since 1999 and helped found a state trade association, the North Carolina Environmental Restoration Association in 2001. Through these associations and separately, RS has been an advocate on behalf of the benefits to private sector mitigation projects as well as efforts to provide high regulatory standards for all types of mitigation and worked cooperatively with both the U.S. Army Corps of Engineers (USACE) and the U.S. Environmental Protection Agency (EPA) on policy initiatives to professionalize the delivery and use of compensatory mitigation.

In 2008 RS successfully permitted *the first private mitigation bank for providing nutrient offset credits in the country* in North Carolina. This was a result of a change in state law in 2007 which for the first time ever allowed for private mitigation banks to provide nutrient offset credits to both point and non-point sources. Up until this change the state in-lieu fee mitigation program, the NCEEP, had been the only source for providing nutrient offset mitigation, most of which it obtained from mitigation companies like RS through the competitive bid Full Delivery process going back to the inception of state mandated nutrient offset requirements in 2001. The North Carolina General Assembly recognized that since almost all of the nutrient mitigation generated by the NCEEP came from private mitigation companies it made sense to let this private industry provide the offsets directly to the impactor as well.

The RS *Wellons Farm* nutrient offset bank was permitted by the North Carolina Division of Water Quality in October of 2008 and a second nutrient offset site, *Lane Farm* subsequently permitted in March of 2009. Together these two sites provide 170,451 pounds of nutrient offset mitigation in the Neuse River Basin of North Carolina.

Over the past twelve years RS has acquired, permitted, designed, constructed, monitored, and put under permanent protection (through conservation easements) a total of 42 different compensatory mitigation projects across the Southeast. Of these, nine stream and wetland mitigation projects have already met or exceeded their USACE prescribed five year monitoring success criteria.

The bulk of the remainder of the projects, wetland and stream, riparian buffer and nutrient offset, are in either their third or fourth year of monitoring. I cite this background in order to underscore that the comments that follow are based on our first hand experience in providing compensatory mitigation, including nutrient offsets, day in and day out, as opposed to theoretical or conceptual plans which have not been borne out in practice.

RECCOMENDATIONS

1) ***Unleash the full power of private sector mitigation efforts: officially authorize and encourage the use of offsets.***

Despite well intended efforts by both government and non-profit entities the reality is that the water quality of the Chesapeake Bay has continued to get worse in spite of the hundreds of millions of dollars spent in order to prevent this very outcome. The key missing component of the efforts to restore water quality to the Bay thus far is the absence of any incentive for private mitigation projects to generate nutrient offsets. This must change and in order for this TMDL effort to be successful, the EPA needs to bring to bear the financial resource of private mitigation efforts.

For instance, RS has been providing nutrient offsets in North Carolina from the time state law allowed private entities to do so. Since then there are now three competing private mitigation companies also selling nutrient offsets in the same watershed which services one the fastest growing metropolitan regions of the country, the Raleigh, Durham, Chapel Hill Research Triangle.

All of these companies spent their own money to purchase land for their sites and perform the restoration work which provides pounds of nutrient offset mitigation as determined and permitted by the North Carolina Division of Water Quality *prior to the impact* which requires the offset, i.e. not only is there no temporal ecological loss there is a significant temporal gain.

2) ***Provide strict regulatory enforcement on non-performing in-lieu fee programs.***

In Virginia the localities have the latitude to use ad-hoc in-lieu fee, pro rata share, and other programs to comply with state prescribed stormwater nutrient reduction requirements through the payment of an arbitrarily set fee. As is the case with most in-lieu fee arrangements, sometimes called 'pay and pave' the fee is always collected up-front and the actual offset mitigation done is on the back end if ever done at all.

There is an undeniable temporal ecological loss and if the obligated offset is not performed for years afterwards then there ought to be a penalty attached to it. We have heard anecdotal reports of some municipalities in Virginia using the fees collected for nutrient mitigation going to completely unrelated municipal services such as snow removal.

If existing programs are found to have substantial backlog obligations or deficits on the fees collected vs. implemented mitigation projects then the EPA should levy a 'cease and desist' order until the program procures the requisite amount of mitigation, including any penalty attached to it, from an approved offset facility including an offset mitigation bank. The in-lieu program should then be limited to only the procurement of approved offset projects going forward and not be allowed to implement its own projects.

3) The EPA should provide the jump start to encourage private mitigation offsets.

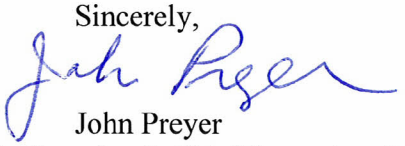
The time is now for the EPA to bring to bear the full power and resource of private capital and green investment opportunities in a truly unprecedented size and scope. The EPA should issue a Request for Proposal for 1,000 pounds of certified and approved offset credits from each Bay state concurrent with issuance of the final TMDL. This provides the 'stick and carrot' needed to focus the attention of all relevant parties to the process.

The same Request for Proposal process should be followed again in another six months with another 1,000 pounds from each Bay state. By the second issuance of the request there will no doubt be multitude of viable offsets offered in multiple locations. If successful there could follow a rolling Request for Proposal process every six months in order to keep fulfilling the demand.

Finally, it our hope that the EPA will refrain from instituting an overly cumbersome trading system involving multiple entities adding layers of complexity to what ought to be a simple transaction between the buyer and seller. This is best accomplished by refraining from top-down command and control of the process and letting the market work.

Please provide your response to the following question: what role does EPA envision for the ability of private offset to be utilized in conjunction with this TMDL?

Sincerely,



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